IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 28, 2009 Session

STATE OF TENNESSEE v. MICHAEL LEWIS

Appeal from the Circuit Court for Bledsoe County
No. 51-2007 Buddy Perry, Judge

No. E2008-02141-CCA-R9-CD - Filed November 20, 2009

In this interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure, the State challenges the trial court's grant of a new trial to the defendant, Michael Lewis, who was convicted by a Bledsoe County Circuit Court jury of one count of child abuse. *See* T.C.A. § 39-15-401. Because we hold that the trial court erred by granting the defendant a new trial, we reverse the judgment of the trial court and remand the case.

Tenn. R. App. P. 9; Judgment of the Circuit Court Reversed and Remanded

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and D. KELLY THOMAS, JR., J., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; J. Michael Taylor, District Attorney General; and James W. Pope III, Assistant District Attorney General, for the appellant, State of Tennessee.

Michael Lewis, pro se (at trial); J. Lynn Brooks, McMinnville, Tennessee (at hearing on motion for new trial and on brief); and Keith H. Grant, Dunlap, Tennessee (at oral argument), for the appellee, Michael Lewis.

OPINION

The single issue presented in this State appeal is whether the trial court erred by granting the defendant's motion for a new trial. The State contends that the trial court erroneously concluded that it had improperly infringed upon the defendant's decision to testify on his own behalf. The defendant contends that the trial court correctly concluded that comments made by the court during the trial had the effect of forcing the defendant to take the stand.

Factual and Procedural Background

On July 23, 2007, a Bledsoe County grand jury charged the defendant, Michael Lewis, with one count of child abuse against his son, L.L.[1] The trial court appointed counsel to represent the defendant, but the defendant later asked his attorney to withdraw and moved the court for permission to proceed pro se. After the defendant executed a waiver of his right to counsel, the trial court granted his request to represent himself at trial. The trial court also appointed an assistant district public defender to act as "elbow counsel" to the defendant.

At trial, the evidence established that the victim's mother, Tonya Hickman, took the victim to the defendant on Friday, December 15, 2006, so that the defendant could exercise his weekend visitation with the victim. When she picked the victim up on Sunday, December 17, 2006, the victim told his mother that the defendant had whipped him. Ms. Hickman, along with officials from a hospital emergency room, the Bledsoe County Jail, and the Department of Children's Services, testified that L.L. had numerous "whelps" on his back, buttocks, and legs.

During the defendant's cross-examination of Ms. Hickman, the following exchange took place:

> [The defendant] On Sunday, so you called on Sunday. When did you receive the first message?
> [Ms. Hickman] On Sunday.
> [The defendant] On Sunday. Did you not check your phone from Friday to Sunday?
> [Ms. Hickman] The first message was on Sunday, and then she called me back a couple of hours later.
> [The defendant] No, that's not true.
> GENERAL POPE: Object, Your Honor, to the statement.
> THE COURT: I don't think he understands. What you do is you ask her the questions and then if you disagree with it, when you get on the stand you can tell your side rather than make a comment about it now.

Later during the cross-examination of Ms. Hickman, a similar exchange occurred:

> [The defendant] Can you give me a random number or an accurate number of how many whippings I've give[n] him, because I can give you right now to the - -
> THE COURT: You can do it when you testify. You can't do it right now.
> [The defendant] Right.

[1] It is the policy of this court to refer to the minor victims of child abuse by their initials.

Another, similar exchange occurred only a few questions later:

> [The defendant] When things happen in your life does it not register in your memory as something to look back on from any point at any given time? Is it not part of your memory? I can remember everything I've done all my life.
>
> GENERAL POPE: Object.
>
> [The defendant] I would assume somebody else would do the same thing.
>
> GENERAL POPE: Object.
>
> THE COURT: You have to ask questions. You don't make statements to the jury.

Later, during the defendant's cross-examination of juvenile court officer Rhonda Sills, the following exchange took place:

> [The defendant] Do you remember me coming in with him approximately a year ago?
>
> [Ms. Sills] No.
>
> [The defendant] Well, about a year ago - -
>
> GENERAL POPE: Object, Your Honor.
>
> THE COURT: Sustained. If she doesn't remember, if you want to tell about it you have to testify. You don't tell them - -
>
> [The defendant] I sure will.

At the conclusion of the trial, the jury convicted the defendant of the single charged offense of child abuse. The defendant later filed a timely motion for new trial and an amended motion for new trial alleging, among other things, that "[t]he [c]ourt improperly commented about [d]efendant testifying on his own behalf, in violation of [d]efendant's right against self-incrimination secured by the 5th Amendment to the United States Constitution and Article 1, § 9 of the Tennessee Constitution." At the conclusion of the hearing on the motion for new trial, the trial court ordered the parties to submit further briefing on several issues raised by the defendant, including whether the court had infringed upon the defendant's choice to testify on his own behalf. Two months later, the trial court entered an order granting the defendant's motion for new trial. The court ruled,

> Based upon the arguments of counsel for [the d]efendant and for the State heard in open Court, the briefs of counsel, and the entire record as a whole, it is the finding of this Honorable Court that the comments made by the Court during the trial to [the d]efendant regarding his right to take the stand violated his Fifth Amendment right.

In this appeal, the State contends that the trial court erred by granting the defendant's motion for new trial because "the court's admonitions to the defendant at trial were not impermissible comments on his failure to testify, and there is no evidence that the defendant felt forced to testify based on these comments." The defendant argues that the trial court's ruling was proper because "the trial court's comments about [d]efendant testifying *compelled* [d]efendant to testify at his jury trial, thus taking out of [d]efendant's hands the right to decide for himself whether or not he would testify at his jury trial."

Because the issue raised presents questions of both law and fact, our standard of review is de novo with no presumption that the ruling of the trial court is correct. *See State v. Joey Dewayne Thompson*, 285 S.W.3d 840, 846 (Tenn. 2009) (holding that "standard of review for mixed questions of law and fact is de novo review without any presumption of correctness" (citing *State v. Rush*, 50 S.W.3d 424, 427 (Tenn. 2001))).

At play in this case are the defendant's right to represent himself and his right to decide for himself whether he will testify at trial. Here, the defendant's decision to represent himself gave rise to the comments of the trial court that are at issue. Every criminal accused possesses both the constitutional right to counsel and the prerogative to waive that right and represent himself. *See State v. Burkhart*, 541 S.W.2d 365, 368 (Tenn. 1976). When a defendant chooses to represent himself at trial, he does not forego the right to testify as a witness on his own behalf, but he does not gain the right to make unsworn statements to the jury in his role as counsel. *See id.* at 371. As our supreme court explained,

> Quite aside from the fact that such a statement would be of questionable value, there is for consideration the patent unfairness to the State of permitting a defendant to make an unsworn statement, not subject to cross-examination, and without leave for the State to comment upon his failure to testify in the regular manner.

Id.

Here, the defendant attempted on four occasions to interject unsworn statements into his cross-examination of the State's witnesses. The trial court correctly sustained the State's objections to the statements and informed the defendant that the proper time for such statements was when he took the stand as a witness. The trial court's directions in this regard were a correct statement of the law. The defendant was not permitted to offer unsworn testimony, regardless of his role as counsel in the case.

Further, the trial court's statements did not rise to the level of improper comment on the defendant's decision whether to testify, and the record does not establish that the statements compelled the defendant to testify against his wishes. The defendant began the presentation of his case by making the following promise to the jury:

> Basically what I'll end up doing is I'll wait for my opportunity to sit in the witness chair and I will tell you word for word what the whipping was and why I whipped him and what was done and what we talked about before I whipped him. . . . My intent was only to teach him a lesson, to teach him right from wrong, and to show him that there's a better way to live and a better way to be and to know that the thing that I'll tell you about later, you'll see that it's fair and I don't see that there's anything wrong with it.

Later, during his cross-examination of Ms. Hickman, the defendant again indicated his intent to testify:

> [The defendant] He was whipped one time. And if you would like, when I come up here and take the stand I'd be more than happy to - -
>
> THE COURT: Ask her questions.
>
> [The defendant] Would you like to stay and hear my testimony?
>
> THE COURT: She's not entitled to do that. She's a witness. You asked for the rule, she has to be outside. You're the one that asked.
>
> [The defendant] She'll be done testifying.
>
> THE COURT: Ask the questions.

Then, when questioning the victim, the defendant again made reference to the fact that he would testify, telling the victim, "Do you want to tell everybody about it? You won't be in trouble or nothing. They just want to know if what you say is going to match what I say. They want to know if I'm telling the truth now." And when admonished by the trial court during his cross-examination of Ms. Sills, the defendant again indicated that he intended to testify, stating, "I sure will." Then, after presenting a single witness, the defendant informed the court, "Your Honor, I'd like to take the stand for testimony."

The defendant suggests in his brief that "[d]espite" his "ill-advised statements" that he would testify, it was in fact the trial court's comments that led the defendant to testify rather than his own desire to do so. The record simply does not support this conclusion. Although the defendant correctly points out that he was not required to make a final decision regarding whether he would take the stand until the close of the proof, no principle of law would have prevented him from making such a decision earlier and making his intentions known to the court. Indeed, the record in this case establishes that the defendant intended, from the very outset of the trial, to testify on his own behalf. The statements that the defendant now characterizes as "ill-advised" actually identified his own testimony as the cornerstone of his defense. He cannot now be heard to complain that he was forced to testify against his wishes after making his desire to testify so clearly known to the court and to the jury.

Moreover, although the defendant laments that he had "no opportunity to relate to the trial court whether or not he had changed his mind about testifying, or whether he felt compelled to testify," he indeed possessed such an opportunity at the hearing on his motion for new trial. *See* Tenn. R. Crim. P. 33(c)(1) ("The court may allow testimony in open court on issues raised in the motion for a new trial."). The defendant did not attempt to offer any testimony at the hearing to support his claim that he was compelled by the trial court's comments to testify. Given the defendant's repeated assertions that he intended to testify and the lack of any evidence that the trial court's comments compelled him to testify against his wishes, the trial court erred by granting the defendant's motion for new trial.

Accordingly, the judgment of the trial court is reversed, and the case is remanded to the trial court for a ruling on the remaining issues raised in the defendant's motion for new trial.

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JAMES CURWOOD WITT, JR., JUDGE